OVERBLOWN FEARS: THE IMPACT OF JACKSON V. BIRMINGHAM BOARD OF EDUCATION IN CALIFORNIA SCHOOLS

By

Jonathan Louie*

Introduction

In March of 2005, the United States Supreme Court published its opinion in the case *Jackson v. Birmingham Board of Education*.[1] The opinion held that whistleblowers (individuals that report alleged wrongdoing) could pursue an action on a theory of retaliation if they are fired for complaining on behalf of others.

This article explores the future of gender discrimination suits in the schools, and answers the question of whether the *Jackson* decision effectively has declared "open season" on California schools and enabled a previously nonexistent type of civil action.

Part I of this article provides an overview of both California and federal Title IX jurisprudence. The section analyzes federal equal protection jurisprudence through a series of Supreme Court opinions. California's approach ultimately is deemed to be similar in all major aspects.

Part II discusses the salient features of *Jackson.* Drawing on the dissent, this section raises the policy concerns associated with extending Title IX protections to whistleblowers.

Part III addresses whether *Jackson* impacts school employees' rights under California Law. This article concludes that employees' rights will be largely unaffected, existing causes of action are capable of affording comparable relief, and no substantive changes need be made.

---

* Jonathan Louie, University of the Pacific, McGeorge School of Law, is a Runner-Up Winner of the 2005 Competition for Outstanding Student Papers in the Area of Labor and Employment Law, a statewide competition sponsored by the Labor and Employment Law Section. This paper is his winning entry.

The Lay of the Land: Traditional Enforcement of Equality in Education

The 1960s are well documented as a decade rife with dramatic social change. Staged "sit-ins" by African Americans at segregated lunch counters in the South, Rosa Parks' arrest for refusing to yield her seat on the bus to a white passenger, and the murders of civil rights activists (dramatized in films such as *Mississippi Burning*) were a sample of representative events. It was within this crucible that Congress enacted The Civil Rights Act of 1964. Of particular importance was Title VI of the Act, the section that prohibited discrimination in federally assisted programs. It held:

> No person shall on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program receiving federal financial assistance.[2]

In 1972, Title IX was passed into law as a part of the Educational Amendments of 1972. Using language that closely paralleled the language of Title VI, Title IX prohibited discrimination on the basis of gender under any *educational program or activity* receiving Federal financial assistance.[3] Participation in sports generally has been recognized as part of the educational process and consequently must satisfy equal protection scrutiny.[4]

The principle behind statutes such as Title VI and Title IX is that federal funds should not be used to support programs that discriminate on the basis of immutable traits such as race or gender.[5] To effectuate the eradication of discrimination, the statutes' ideal penalty, cessation of government aid, is so draconian that few contemplate noncompliance.[6] As a practical matter, the cutoff of funds is more likely to be extremely disruptive in educational settings and as such, most remedies involve collaborative efforts between the schools and the Office of Civil Rights to gradually achieve compliance.[7]

The Supreme Court has articulated a series of principles addressing the issue of private rights of action. The Court held that Title IX implies a private right of action to enforce its prohibition on intentional sex discrimination. Such actions may be initiated concurrently with administrative remedies and are a proper vehicle for seeking monetary damages.[8] The Court extended the right to pursue private actions to instances where entities receiving public funding have demonstrated deliberate indifference in resolving allegations of discrimination between:

1) teachers and students, and

2) students.[9]

California's equivalent statutory scheme voices many of the same ideals as the Civil Rights Act of 1964.[10] The Education Code announced California's policy of affording all persons, regardless of sex, equal rights and opportunities in the state's educational institutions.[11] Education Code § 201(b) takes the policy one step further imposing an affirmative obligation on California's schools to combat "racism, sexism, and other forms of bias.[12] In 2003, California amended two statutory provisions and added two more, setting forth "standards to determine whether educational institutions have effectively accommodated the interests and abilities of both sexes in athletics."[13]

Enforcement measures likewise threaten state-sponsored educational institutions engaging in discriminatory practices with the loss of state funding and permit simultaneous private causes of action to be maintained pending administrative relief.[14]

In the context of employment law, Title VII of the Civil Rights Act of 1964 strove to eradicate discrimination on the basis of immutable characteristics in the workplace.[15] California's Fair Employment and Housing Act, and §§ 51-52 of the California Civil Code (the Unruh Civil Rights Act) contains similar language to Title VII of the Civil Rights Act of 1964,

and serves a similar purpose.[16] The similarity between the two statutory schemes indicates that federal preemption issues seldom arise.[17] Indeed, when California Courts have yet to decide an issue, they frequently adopt standards set by the Supreme Court for proving a discriminatory act.[18]

With the factual background and interplay between state and federal jurisdiction in mind, we turn to *Jackson*.

The Advent of Jackson v. Birmingham Board of Education

In August of 1999, the Birmingham school district transferred Roderick Jackson, a physical education teacher and girls' basketball coach with more than a decade of teaching and coaching experience, to Ensley High School. Shortly thereafter, he discovered the girls' team did not receive equal funding as the boys' athletic programs, and that the girls did not have equal access to the school's athletic facilities.[19]

Jackson first complained of the inequity to his supervisors in December 2000. Jackson received his first negative performance review from the Board, which ultimately stripped him of his coaching responsibilities in May 2001. Nothing in the facts suggests that he had a previous discipline record. At the time of filing, Jackson retained his position as a physical education teacher, but lost the supplemental income that the coaching position afforded him. The Court ultimately ruled on three issues.

First, the court ruled retaliation in response to a complaint about sexual discrimination is discrimination on the basis of sex.[20] Retaliation was found to be an intentional act of discrimination, as the normal definition of discrimination implies differential treatment.[21] Stripping Jackson of coaching duties was an intentional response to his reporting inequality and thus was actionable.

Second, Title IX never imposed a requirement that the complaining party personally suffer gender-based discrimination. Writing for the majority, Justice O'Connor argued that the words "discrimination on the basis of the individual's sex" appear nowhere in the statute, and to read them in would impermissibly introduce a substantial qualification into the text.[22] Thus the Court broadly interpreted Title IX, and held that a distinction between direct and indirect discrimination was immaterial.[23]

A vigorous dissent took issue with the majority's interpretation of Title IX, and argued that traditional interpretation of Title IX required the complaining party to have suffered on account of his or her gender.[24] The Court historically has decided disparate treatment claims by determining whether the claimant's sex actually played a role in the decision-making process, and had a determinative influence on the outcome.[25] Thus, Thomas argued that Jackson had failed to establish how *his gender* played a significant role in the loss of his coaching responsibilities.

Principles of statutory construction, the dissent argued, additionally did not support such a broad interpretation. The court must first analyze the statutory text, assign the words contained therein their ordinary meaning, and not add or alter the text in any material way.[26]

Application of these principles admonishes the court against the dangers of reading substantial qualifications into a statute. Despite the similar structure of Title VI and Title IX, an action for retaliation was created in Title VI, but no similar provision is found in Title IX. The absence of this language is significant because it is a reliable indicator of differing legislative intent.[27]

Last, the Court held that because enforcement of Title IX relied heavily on reporting of wrongdoing, Congress intended to provide effective protection to individuals that reported

wrongdoing. Jackson thus had standing to pursue a claim related to discrimination that originally targeted female athletes. Reasoning that witnesses to discrimination would be loathe to report if retaliation could be invoked on a whim, the Court held that measures against retaliation are inherent in Title IX. The Court also suggested that adults alone have the sophistication to recognize discrimination in the educational settings, and as such, teachers are best situated to vindicate the rights of students.[28]

The dissent argued that protection from retaliation is a prophylactic measure to guard a primary right.[29] Remedies for violation of the primary right consequently are completely independent of remedies for retaliation. Thus, Jackson could assert a retaliation claim without having to prove the primary right had been violated.[30] This theoretically could create a potentially limitless class of claimants, because merely being associated with a victim of gender discrimination would appear to state a claim. Nothing in the record indicates that the girls' team was prevented from reporting discrimination themselves, and creating a prophylactic measure that insulates coaches and teachers from retaliation may be unnecessary in light of the girls' ability to report.

Overblown Fears: Is a new cause of action truly created?

In light of this discussion of *Jackson*, this paper concludes that employees need not fear unfettered reprisal in the event they report alleged wrongdoing. Existing causes of action provide the relief that Jackson seeks, and modification to California law will be extraneous. The issues presented in Jackson could be framed in terms of federal educational law regulating discipline of school employees. Alternatively, California permits actions in wrongful termination in violation of public policy (dubbed "Tameny claims") that permit comparable recovery and encompass the concepts expressed in *Jackson.*[31]

General federal policies dictating employee discipline and dismissal suggest that adverse employment action taken shortly after the exercise of a protected right will provide the basis for a claim. In general, discipline and dismissal must be supported by grounds or just cause. Such causes include, but are not limited to, insubordination, deliberate neglect of duties, and engaging in unbecoming conduct.[32] At a minimum, school districts generally must establish a nexus between a school employee's conduct and a negative effect on the performance of employee duties.[33] The nexus requirement has gained widespread acceptance because the ultimate purpose is to determine an individual's fitness to work in an educational setting. The school board had not launched such an inquiry in Jackson's scenario.

On occasion, the special function that school employees serve may prompt variance from the nexus analysis. School employees, particularly teachers, admittedly are in a position of special public trust.[34] They serve as role models to youth and instill basic skills necessary for proper participation in civic discourse. Nothing in *Jackson's* factual background suggests that there would be reason to vary from the nexus, so Jackson could at least present a triable issue of fact under the federal standards, without resorting to a Title IX claim.

California's protective mechanism, the Labor Code explicitly forbids employers from retaliating against employees who in good faith report alleged violations of state or federal law.[35]

Reporting alleged wrongdoing is an activity protected under the public concern doctrine of the First Amendment.[36] This doctrine, first articulated in *Connick v. Myers*, held that a DA's questionnaire regarding the method of assigning cases to particular district attorneys was not found to constitute a matter of public concern, as it protested an internal system that assigned cases to respective district attorneys. In contrast, the Board punished Jackson for complaining about the girls' team receiving less funding and access. Courts have historically ruled that

speech regarding the disposition of public funds is likely a matter of public concern.[37] Federal case law has recently expanded the public concern doctrine to speech relating to athletic programs.[38] In 2001, an Ohio district court stated that discipline of faculty and educational staff likewise was a public concern.[39] Absent more facts, individuals similarly situated to Jackson in all likelihood will establish that the school district infringed upon the exercise of a constitutional right, and any adverse employment action taken against the employee will likely raise First Amendment challenges.

In California, *Tameny v. Atlantic Richfield* controls employment at will settings, and sets a four part test for determining which policies are viable for sustaining a *Tameny* claim.[40]

The policy must be tethered to a constitutional or statutory provision. Title IX was enacted to combat sex discrimination. The Sex Equity in Education and the Educational Equity provisions are California's statutory equivalent. Combating discrimination in schools is clearly linked to both state and federal provisions, and situations factually similar to Jackson's should satisfy this element.

The policy must also be one inuring to the public at large as opposed to the individual. Thus individuals situated similarly to Jackson would bear the burden of showing that the harm suffered was detrimental to the public. Invidious discrimination inures to the general public because it foments strife and unrest.[41]

The third requirement holds that the policy must be firmly established. Policies satisfying this requirement are defined to be "ones about which reasonable persons can have little disagreement."[42] Thus under California law, it is ludicrous that a Court would reject the notion that women are entitled to equal opportunities in education. Scenarios similar to Jackson at a minimum should be able to state a claim.

Last, the policy must be fundamentally "substantial and fundamental." These terms are treated as a single concept, and the Court traditionally has tested whether the policy is consistently supported by statutes and legislative policy.[43] The legislative history behind whistleblowing statutes, and reporting sexual discrimination, speaks for itself. Enforcement of this provision is heavily dependent on reporting the commission of social wrongs, thus protection of whistleblowers is necessary to proper enforcement. Indeed, in *Collier v. Superior Court*, the Court recognized a strong public interest in reporting wrongdoing, regardless of the complaint passing through internal channels as opposed to release to the general public.[44]

The facts of this case under California Law thus would permit Jackson to pursue a Tameny claim and seek damages for retaliation, or to pursue an action for improper employee discipline under established federal guidelines.

Time has yet to tell whether *Jackson* will dramatically change the battlefield, yet California jurisprudence apparently has addressed the concerns that Jackson could potentially raise. California's statutory provisions are drafted broadly enough to encompass the damages sought in Jackson, and employees will likely find that their right to report the occurrence of sexual discrimination essentially unchanged. There will likely be no need to drastically amend current statutory provisions to obtain conformity with *Jackson* v. *Birmingham Board of Education*.

---

[1] *Jackson v. Birmingham Board of Education* (hereinafter *Jackson*) 125 S. Ct. 1497 (2005).
[2] See generally CIVIL RIGHTS ACT OF 1964, 42 U.S.C. §§2000(d) *et seq.* (1964).
[3] The Educational Amendments of 1972 (P.L. No. 92-318, 86 Stat. 373) later codified in 20 U.S.C. §§ 1681 *et. seq.* (1972), emphasis added.
[4] See generally *Swann v. Charlotte-Mecklenburg Bd. of Educ* 402 U.S. 1 (1971), *reh'g denied*, 403 U.S. 912 (1971).
[5] See Julie Davies, *Title IX, Education Amendments (1972)* in 3 MAJOR ACTS OF CONGRESS, 229 (Brian K. Landsberg ed. 2004).
[6] Transcript of Oral Argument in *Jackson v. Birmingham Board of Education*, 2004 U.S. TRANS LEXIS 73, 13 (Nov. 30, 2004) (questioning by Justice Scalia emphasizing the effectiveness of cutting off funds).

[7] Davies, *supra* note 5, at 230.
[8] *Cannon v. University of Chicago*, 441 U.S. 677, 690-693 (1979; see generally *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).
[9] See generally *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274 (1998) (holding that a school district's lackadaisical response to allegations of sexual impropriety between a teacher and a student constituted gender based discrimination) and *Davis v. Monroe County Bd. Of Ed.*, 526 U.S. 629 (1999) (indifference investigating allegations of sexual harassment amongst students constituted discrimination).
[10] See generally CAL. EDU. CODE §§ 221.5-231.5 (commonly referred to as Educational Equity and targeting elementary education), 66250-66292.4 (West 2004) (these provisions are commonly called the Sex Equity in Education Acts, and target secondary education and beyond).
[11] CAL. EDU. CODE § 200 (West 1982).
[12] CAL. EDU. CODE §201(b) (West 1994).
[13] JUDGE HAROLD E. KAHN & ROBERT D. LINKS, ESQ., CALIFORNIA CIVIL PRACTICE: CIVIL RIGHTS LITIGATION § 10.27 (2004).
[14]Legislative Counsel Digest to AB 499, as chaptered on September 28, 1998, at http://www.leginfo.ca.gov/bilinfo.html. ; see also CAL. EDU. CODE § 202 (West 1982).
[15] See generally 42 U.S.C. § 2000e *et seq.*
[16] The Unruh Civil Rights Act, CAL CIV. CODE §§ 51-52 (West 1982) (establishing non-discriminatory practices in business establishments); See also HON. MING W. CHIN, DAVID A. CATHCART, ALAN B. EXELROD, and HON. REBECCA A. WISEMAN, CALIFORNIA PRACTICE GUIDE: EMPLOYMENT LITIGATION (hereinafter EMPLOYMENT LITIGATION), § 7:10 .
[17] EMPLOYMENT LITIGATION, *supra* note 17, § 7.11.
[18] See *Los Angeles County Dept. of Parks & Recreation v. Civil Services Commn.*, 8 Cal.App.4th 273, 280 (1992).
[19]See generally Plaintiff's Supplemental brief & *Jackson, supra* note 1, 125 S. Ct. 1497, at 1500 (alleging that the girls' team was denied a key to the gymnasium thus interfering with both team practices and the execution of Jackson's coaching duties).
[20] *Jackson, supra* note 1, at 1504
[21] *Id.*.
[22] *Jackson, supra*, 1507.
[23] *Robert F. Kennedy Medical Center v. Belshe* (1996) 13 Cal.4th 748, 756, quoting *Burden v. Snowden* (1992) 2 Cal.4th 556, 562 (1992) (holding that if statutory text is unambiguous, then the Court may not materially alter its meaning).
[24] See Jackson, *supra* note 1, at 1511 (emphasis supplied); See e.g. the complainants in *Davis* (girl alleging classmate sexually harassed her) and *Gebser* (female student engaged in illegal sexual relationship with teacher).
[25] *Jackson, supra* note 1, at 1511 citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).
[26] See *Lungren v. Deukmejian* 45 Cal.3d 727, 735 (1988); *California Air Resources Board v. Hart* Cal.App.4th 289, 295 (1993); see generally *Leocal v. Ashcroft*, 125 S. Ct. 377, 382 (2004); see also note 23, *supra*.
[27] See generally *People v. Goodloe* 37 Cal.App.4th 485, 491 (1995) (recognizing that legislation is the result of informed debate, and that absence of any provisions is the product of debate).
[28] *Jackson, supra* note 1, at 1508.
[29] *Id.*, at 1513.
[30] See e.g. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1995) -(analyzing Title VII of the Civil Rights Act of 1964 and holding "primary purpose of antiretaliation provisions"is to provide [complainants] with "unfettered access to statutory remedial mechanisms").
[31] Note: The commentary on Tameny claims emphasizes the at will characteristic of employment. For the purposes of analysis, Jackson will be treated as an at will employee. School employees in term employment may only be discharged for blatant disregard of duties, unbecoming conduct, etc., conditions that are not supported by the facts.
[32] See generally 2 EDUCATION LAW §§ 6.10(3)(a)(i)-6.10(3)(a)(iii) (James A. Rapp, ed. 2004).
[33] See generally *Morrison v. State Bd. of Edu.*, 1 Cal.3d 214 (1969).
[34] See generally *Dupree v. School Comm. of Boston*, 446 N.E.2d 1099, 1101 (1983).
[35] See CAL. LAB. CODE § 1102.5(b) (West 2005) which provides: An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute; see generally *Tameny v. Atlantic Richfield Co.* 27 Cal.3d 167 (1988).
[36] See generally *Connick v. Myers*, 461 U.S. 138, 103 S. Ct.. 1684 (1983).

[37] See generally 2 EDUCATION LAW 6.13(8)(b)(ii)((James A. Rapp, ed. 2004).
[38] See e.g. *McGee v. South Pemiscot Sch. Dist.*, 712 F.2d. 339 (8th Cir. 1983) (letter was sent to a newspaper to inform the community that the track program would be cut, despite the community taking measures to preserve the program) quoted in EDUCATION LAW, note 34 *supra*, §6.13(8)(b)(ii), footnote 128.
[39] See generally *Fisher v. Wellington Exempted Village Schs. Bd. of Educ.* 223 F.Supp.2d 833 (N.D. Ohio, 2001).
[40] See e.g. EMPLOYMENT LITIGATION, *supra* note 16, §§ 5:25-5:27 (discussing how actual termination of employment need not exist to prevail on a *Tameny* claim).
[41] See *City of Moorpark v. Sup. Ct. (Dillon)*, 18 Cal.4th 1143, 1160 (1998).
[42] See *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 668 (1988).
[43] See *Sullivan v. Delta Air Lines, Inc.*, 58 Cal.App.4th 938, 943-944 (1997).
[44] See *Collier v. Superior Court of Los Angeles County*, 228 Cal.App.3d 1117, 1123 (1991).